rights are rights to farm over Crown Land and are a form of customary tenure; the holders are mere licensees of the Crown, but it has been my experience that this is difficult to explain to Dayaks in general and they regard it as land owned by them. *Temuda* rights are created only for the use of the original worker, his heirs and descendants. They certainly cannot be transferred for value. If the 'owner' leaves the district the land reverts to the longhouse for communal use under the authority of the *Tuai Rumah* who can allocate the land to anyone in the house who he considers most needs the land. This of course only applies if there are no heirs remaining in the district. If such do remain then they take over the use of the land. If ever the 'owner' returns to the district he can resume the use of the land. The 'owner leaving the district without any heirs to take over the land may arrange for someone else to have the prior right to farm that land by taking from him what is called *'tungkus asi'*, which is some form of token to bind the agreement. It may not be anything of value, which would invalidate the transaction, but may consist of as much as a pig. The rights taken over by the person paying the *'tungkus asi'* are inheritable by the heirs of that person but revert to the original owner if he returns, or to his heirs if they return."

A further and important case is that of *T. R. Bujang anak Guntor* v. *T. R. Tanjong anak Usat.*[4] It is important in that there it was recognised that longhouse communities can agree to boundary lines which will prevent members from acquiring *'temuda'* rights in each others area.

That these decisions are not exhaustive of the law is clear. They must necessarily have been governed by the particular facts before the court and the form of the questions posed for consideration. But the constant reference to district, river and *Penghulu's* jurisdiction and to the creation and loss of rights is abundant authority for the point at issue.

There is no direct authority for the proposition that *temuda* rights once established may be lost by the drawing of a boundary. Indeed the case of *T. R. Bujang anak Guntor* v. *T. R. Tanjong anak Usat, supra,* may appear to be somewhat against such a possibility. But in that the land in question was within the jurisdiction of one *Penghulu,* a point very material to the decision, it may be inferred that the rights in question may well have been lost if as here the area involved was within the jurisdiction of another *Penghulu.* The view of this court is that the *temuda* rights could have been so adversely affected.

The answer to the second question posed therefore is, yes.

What rights a 'Sibu Iban' could have over *temuda* abandoned, or forfeited, by the Oyah Iban remains a moot point. If such person cannot establish any right over that land by virtue of the agreement itself or by any other customary usage it remains of course unencumbered State land and there cannot be any question of his having any claims to 'compensation' from Government, a point very much in the mind of both parties.

This court feels that on the evidence there is a strong possibility that there was some agreement between Penghulu Kaya and Penghulu Imban and that further evidence should be sought thereon. The terms of such agreement would of course have to be clearly established particularly the terms of any provision providing for the loss of *'temuda'* rights already in existance.

However from what has been said it is clear that each claim must be considered separately and in that that was not done here there is no point in ordering a retrial.

This court therefore makes no further order and each claim to *'temuda'* land must be dealt on its merits, but with regard to the answers here given to the questions posed by the Resident Native Court.

It should be noted that the court has confined itself in this case to a consideration of the rights to farm *'temuda'* land. Different consideration apply to the right to receive the benefit of fruit and rubber trees. Both Penghulu Jinggut and Mr. Anyaw are adamant that no agreement between communities could deprive an individual and his heirs to their 'property' in such trees. Those trees remain his until they wither and die.

Penghulu Jinggut and **Anyaw,** assessors, concurred.

GOVERNMENT OF MALAYSIA v. THELMA FERNANDEZ & ANOR.

[O.C.J. (Raja Azlan Shah J.) December 14, 1966]

[K.L. — Civil Suit No. 292 of 1966]

Contract — Scholarship agreement — Whether stipulation in agreement to refund on breach of agreement of all monies paid in respect of student's course of training a penalty.

The plaintiff claimed damages for breach of a scholarship agreement entered into between the plaintiff and a student, with the defendants as sureties. The defendants denied that the student had committed a breach of the agreement and also alleged that the provision in the agreement for the refund of all monies which had been paid by the plaintiff in respect of the student's course of training is a penalty and therefore not refundable.

Held: (1) on the facts the student had left the service of the plaintiff without their approval and consent and had therefore committed a breach of the agreement;

(2) the damages stipulated for in this agreement was not extravagant or unconscionable and therefore was not a penalty.

Cases referred to:—

(1) *Public Works Commissioner* v. *Hills* [1906] A.C. 368, 375.

(2) *Dunlop Pnuematic Tyre Co.* v. *New Garage & Motor Co.* [1915] A.C. 79.

(3) *Clydebank Engineering & Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6 at p.11.

(4) *Gore* v. *Gore* [1964] M.L.J. 184.

CIVIL SUIT.

Au Ah Wah (Senior Federal Counsel) for the plaintiff.

Miss Loo Sin Soo for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an application by way of summons-in-chambers for judgment under R.S.C. O. 32 r. 6.

It is common ground that one James Fernandez (hereinafter referred to as the student) entered into an agreement with the plaintiff, the Government of Malaysia, on 5th November, 1960, with the two defendants as sureties whereby the student agreed to and in fact pursued a course of training at the Malayan Teachers Training College, Penang, for two years and completed the said course some time in 1962. The agreement *inter alia* provides that should the student refuse to serve, or refuse to continue to serve, or resign, or leave the service of the plaintiff without their consent, the student and the sureties shall be jointly and severally liable to refund to the plaintiff on demand all monies which have been paid by the plaintiff in respect of the student's course of training. On completion of the said course the student was posted for practical teaching to the Dungun English School, Dungun, in January 1963. Some time in June 1965, after having served the plaintiff for about 2½ years the student, for reasons which shall be shown below, left the service of the plaintiff. The defendants in their pleadings admitted entering into the said agreement with the plaintiff as sureties and as shown in paragraphs 4 and 5 all they say is they "will refer to the said agreement at the trial for its full terms and effect thereof". Furthermore, the defendants at paragraph 7 of the defence deny that the student had committed breach of the agreement, and at paragraph 10 they aver that the student was compelled to resign under the circumstances as outlined in paragraphs 8 and 9 which are as follows:—

"8. The defendants further state that after teaching in the said school for 2½ years, the student arranged by mutual consent with a colleague for transfer to the Banting Secondary School, Selangor, and with the approval of the headmaster of the Banting Secondary School, Selangor, and the Dungun English School respectively. The Chief Education Officer, Selangor, refused to approve the transfer with the result that the student was first sent back to Dungun English School and finally posted to the Sultan Ismail Primary School in Trengganu which post was not commensurate with the education and training he had received.

9. The student subsequently requested the Minister of Education for a temporary suspension of his contract so that he could pursue a University course or alternatively a transfer to a secondary school and as a last resort a transfer out of the State of Trengganu."

It is apparent from the pleadings that the student had no intention for reasons best known to himself of continuing his service at the Dungun English School and contrived a transfer to the Banting Secondary School, failing which he endeavoured through other devious means as shown in paragraph 9 of getting out of the State of Trengganu, none of which the Ministry of Education acceded to. Finally, to justify the breach of the agreement the defendants contended at paragraph 11 "that as the student was forced to resign under such untenable circumstances, he had not committed a breach of the agreement."

One of the terms of the agreement is set out in clause 1(d)(i) and the relevant portion reads as follows:—

". . . . he/she will if required to do so by the Government . . . . serve the Government as a teacher in any post consistent with the qualifications obtained by the student to which he/she may be appointed for a period of not less than five years from the date of his/her appointment upon the terms and conditions for the time being usually applicable to such post and at a salary in accordance with the scales of salaries for the time being in force relating thereto. Provided that the student may be required by the Government to enter and shall enter as a teacher into the service of any person or persons engaged in the management or government of assisted schools instead of entering into the service of the Government and in any such case any reference in this agreement to Government service or the service of Government shall be deemed to include a reference to such service as a teacher in assisted schools."

The terms are explicitly clear and need no further elucidation. The contention of the defendants that the post the student held was not commensurate with the education he had received is not valid. If the defendants are alleging that the student should be posted to a secondary instead of a primary school then, in the light of the aforesaid terms of the agreement, I am of the view that their contention does not hold water. Having tried various means to discharge himself which failed, the student left the plaintiff's service without their approval or consent.

Finally, the defendants contended that the clause in their agreement providing for the "refund of all monies which have been paid by the plaintiffs in respect of the student's course of training" is a penalty and therefore not enforceable.

When parties enter into a contract they may expressly stipulate not only their primary obligations and rights under the contract, namely, those which are discharged by their performance of the contract, but also their incidental obligations and rights, namely, those which arise as a result of non-performance of any primary obligation by one of the parties to the said

contract. Of these incidental obligations and rights, the commonest is the obligation of the non-performer to make to the other party and the corresponding right of such other party to claim from the non-performer reparation in money for any loss sustained by the other party which results from the failure of the non-performer to perform his primary obligation. The right of such parties to make such a stipulation is subject, however, to the rule of public policy that the court will not enforce it if it is satisfied that the stipulated sum was not a genuine estimate of the loss likely to be sustained by the party not in breach but was fixed *in terrorem* or unconscionable and extravagant and was therefore in the nature of a penalty. Where the court refuses to enforce the "penalty clause" of this nature, the party aggrieved is relegated to his right to claim a reasonable sum not exceeding the sum so stipulated under the provisions of section 75 of the Contract (Malay States) Ordinance, 1950.

The onus of showing that a stipulation is a "penalty clause" lies on the person who is sued on it and the test to be applied is the observation of Lord Dunedin in *Public Works Commissioner* v. *Hills.*[1]

> ". . . . the criterion of whether a sum — be it called penalty or damages — is truly liquidated damages, and as such not to be interfered with by the court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a 'genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation'. The indicia of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made."

Sometimes the terms of the clause may themselves be sufficient to give rise to the inference that it is a penalty. It is an inference only and may be rebutted. Lord Dunedin in his speech in *Dunlop Pneumatic Tyre Co.* v. *New Garage & Motor Co.*[2] had found occasion to discuss the terms which give rise to such an inference. He referred to the illustration given by Lord Halsbury in *Clydebank Engineering & Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo u Castaneda* [3] and suggested as one of the various tests that "It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach". On the other hand, "It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties."

To my mind, the stipulated sum which is said to give rise to the inference that it is a penalty is not extravagantly or unconscionably greater than the loss which is liable to result from the breach. It is not like the case of the builder who was required to build a house for £50 and who had to pay a million for his breach. That extravagance would at once be apparent. "A great deal must depend on the nature of the transaction — the thing to be done, the loss likely to accrue to the person who is endeavouring to enforce the performance of the contract, and so forth. It is not necessary to enter into a minute disquisition upon that subject, because the thing speaks for itself." (*Per* Lord Halsbury in the *Clydebank* case at p. 10). In the present case the plaintiffs obtained no undue advantage. They wanted to train qualified teachers in order to implement their policy in providing education for the ever-growing population in post-Merdeka Malaysia. It is a notorious fact that the plaintiffs were and still are short of qualified teachers. Therefore, the parties envisaged, when they entered into the contract, the possibility of its premature determination on the student's breach and they therefore took steps to avoid the uncertainty, the difficulty, and the expense of proving in a court of law the actual loss sustained in that event by agreeing in advance on an ascertainable sum to be paid by the student which represents a portionable estimate of the probable or possible loss which the plaintiffs would incur. What in effect they have agreed to is this: "The Government wants to train the student to be a qualified teacher but if, after graduation but before the expiry of the minimum five-year period he were to leave the service without approval, he would have to pay back the expenses incurred in training him so that the Government can find another suitable person to be trained as a qualified teacher." That, in my view, is not an extravagant or unconscionable sum compared with the greatest loss that could conceivably be proved to have followed from the breach. On the other hand, it is the plaintiffs who have to suffer a great deal more and the damage they are likely to suffer is far greater than the stipulated sum agreed upon, not to mention that they would lose a qualified teacher and the time factor to train another one. The criterion here is the failure to implement the Government's education policy. That, in my view, far out-weighed any suggestion that it is a penalty. If it is argued that "what would one qualified teacher do for the purpose?", then the answer would be that very thing that it is intended to avoid is this kind of uncertainty, the difficulty and expense which would be necessary if one were to attempt to prove the damage caused. That was the sort of argument counsel

in the *Clydebank* case had put forward, "what would one torpedo-boat do for that purpose," but that argument did not find favour with their Lordships.

As I have said, the substantial question in this case is whether the stipulated sum is a penalty or otherwise. That is a question of law. I have determined that question of law. If I were to hear this case at the proper hearing it would require no further evidence and no further argument. All that is necessary to decide is already included in the present application. There is no serious question of law involved. (See *Gore* v. *Gore* [4]).

In the circumstances I allow the application with costs.

Application allowed.

Solicitors: *Donaldson & Burkinshaw.*

ANTHONY READ v. HENRY ONG

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Pike C.J. (Borneo)) December 21, 1966]

[Kuching — Federal Court Civil Appeal No. X. 37 of 1966]

Contract — Person excluded by Committee of a Turf Club — Person buying ticket for entry into premises — Whether he has a legal right to enter the premises.

The appellant brought an action for damages for injury to his good name and reputation by reason of the respondent causing him to be wrongfully evicted by the police from the public enclosure of the Sarawak Turf Club. The committee of the club had made an order excluding the appellant from the premises under its control. The appellant however bought a ticket and entered the premises. After a report to the police, the appellant was asked by the police to leave and he did so.

Held: (1) the committee had a discretion to exclude any person from its premises;

(2) as the appellant had not disclosed his identity when he purchased the ticket, no valid contract was formed and the appellant was a trespasser;

(3) the removal of the appellant was not effected either by the respondent or by the Turf Club.

Cases referred to:—

(1) *Said* v. *Butt* [1920] 3 K.B. 497.

(2) *Sowler* v. *Potter & Ors.* [1939] 4 All E.R. 478.

FEDERAL COURT.

A. J. Braga for the appellant.

Stephen Yong for the respondent.

Pike C.J. (Borneo): This is an appeal against the decision of the High Court in Borneo dismissing with costs the appellant's action against the respondent for damages for injury to the appellant's good name and reputation, by reason of the respondent causing him to be wrongfully evicted by the police from the public enclosure of the Sarawak Turf Club on 13th February, 1965.

The respondent was sued as secretary of the Sarawak Turf Club and it was alleged that in that capacity he caused the appellant to be evicted from the public enclosure of the club. It was argued before us that the action was in fact against the respondent in a representative capacity, that is to say, as representing the Sarawak Turf Club. In support of this contention, appellant's advocate sought to refer to the Societies Act, 1966. This statute, however, had not yet come into force at the time when the eviction complained of occurred, and the governing statute was the Societies Ordinance (Cap. 107, Laws of Sarawak). No evidence whatever was given that the respondent, as secretary of the turf club, was the member of the club declared and registered under section 28(c) of the Societies Ordinance as the proper officer to sue or be sued as representative of the society. In my opinion, therefore, the action is to be regarded as an action against the respondent personally in his capacity as secretary of the turf club and is in no sense an action against the turf club itself.

The main grounds of appeal upon which the appellant relies are that the learned trial judge erred —

(a) in holding that the letter, Exhibit P.3, excluded the appellant from entering the public enclosure of the Sarawak Turf Club as an ordinary paying member of the public; and

(b) in not holding that the appellant's eviction was caused by the respondent or the Sarawak Turf Club.

The facts of the case as they appear from the record are that the appellant was until 1961 a member of the Sarawak Turf Club and until 1962 a trainer of race-horses. In 1963 he imported a race-horse into Sarawak. This horse was required by the turf club to submit to what is known as a barrier test and subsequent to this test the horse died. The appellant considered the turf club responsible for the death of his horse by reason of having required it to undergo the barrier test too soon after its arrival and before it had recovered from the sea journey and had had time to become acclimatised. The appellant communicated this to the turf club in a letter claiming $3,000 damages and threatening legal action if this sum was not paid within seven days. The turf club rejected this claim and also addressed a letter to the appellant informing him that the committee had directed that he be excluded from the premises of the turf club and intimating that if he was present in any part of the club's premises he would be deemed a trespasser. This is the letter known as Exhibit P.3. The appellant at this time was also a racing correspondent of the newspaper known as *"The Vanguard"* and wrote